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No. 16-111

In the Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., ET AL., PETITIONERS

v.

COLORADO CIVIL RIGHTS COMMISSION, ET AL.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF COLORADO

BRIEF FOR THE MAIN STREET ALLIANCE, AMERICAN INDEPENDENT BUSINESS ALLIANCE, SEATTLE METROPOLITAN CHAMBER OF COMMERCE, AND SAN FRANCISCO CHAMBER OF COMMERCE AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICI CURIAE*

Amici are organizations that collectively represent tens of thousands of small businesses nationwide.

* No counsel for a party authored this brief in whole or in part, and no person other than Amici, their members, or their counsel has made a monetary contribution intended to fund the preparation or submission of the brief. Petitioners and Respondent Colorado Civil Rights Commission have entered blanket consents to the filing of amicus briefs, and copies of their letters of consent are on file with the Clerk. A letter of consent from Respondents Charlie Craig and David Mullins to the filing of this brief has been submitted to the Clerk.

The Main Street Alliance is a national network of state-based small-business coalitions that provide their members with a platform to express views on issues affecting their businesses and local economies. Main Street has affiliates in 15 states, including Colorado. Its work encompasses a broad range of issues affecting the business community, including matters relating to civil rights and the equal treatment of customers and patrons. Main Street's members include approximately 320 small businesses in Colorado and 30,000 small businesses across the country.

The American Independent Business Alliance is a non-profit organization serving a network of 85 local and state organizations across 35 states (four in Colorado) and Washington, D.C., with a cumulative membership of approximately 26,000 independent businesses. These local and state alliances help their constituents compete with larger corporations and serve as a voice for their member businesses.

The Seattle Metropolitan Chamber of Commerce represents 2200 employers across the Puget Sound region, 80% of whom are small businesses. The Seattle Chamber advocates to ensure equal access and opportunity for all businesses and their customers.

The San Francisco Chamber of Commerce attracts, supports, and grows business through advocacy, economic development, and business development. The San Francisco Chamber partners with more than 2500 member businesses and their 200,000 employees to support local business, provide leadership on issues important to business, and take collective action to advance sustainable economic growth.

Amici's members' experiences as small businesses confirm that public accommodations laws promote a healthy and thriving business environment. An exemption for businesses whose products or services contain elements of artistry or creativity would lead to an impractical and unmanageable patchwork that would inhibit economic growth. When consumers have reason to worry that some businesses lining Main Street may refuse to serve them, the entire business community suffers. The resolution of the question presented is of great importance to small businesses, which are uniquely vulnerable to marketplace uncertainty and have a strong interest in predictable rules of uniform application.

SUMMARY OF ARGUMENT

This case presents an issue of vital importance to the hundreds of thousands of small businesses in the United States that form the foundation of the nation's economy. These small businesses flourish in communities with laws that require service regardless of a customer's status. Amici urge this Court to affirm the decision of the Colorado Court of Appeals, which correctly held that the First Amendment does not protect Phillips's refusal to serve Craig and Mullins. Pet. App. 22a-36a.

A. Public accommodations laws are good for business. Study after study shows that businesses—and small businesses in particular—suffer considerable negative economic consequences when operating under laws that permit discrimination. Because discriminatory business conduct by any one business hurts the

bottom line for all businesses in the community, Amici's small businesses overwhelmingly oppose it.

B. As the Colorado Civil Rights Commission ably explains (CCRC Resp. Br. 20-44), Colorado's Anti-Discrimination Act is a generally applicable regulation of Phillips's commercial conduct. The law does not infringe Phillips's freedom of speech or freedom of religion, and the First Amendment does not exempt Phillips's refusal to serve Mullins and Craig.

Amici write separately to emphasize that Phillips's requested exemption from public accommodations laws for inherently expressive conduct would reach businesses in every sector of the economy. Many of Amici's member businesses provide expressive goods or services that would fall under the proposed exemption, which would drastically undermine public accommodations laws and harm the economy.

The government's proposed limitations to Phillips's potentially massive expansion of this Court's expressive conduct jurisprudence are not practical or meaningful. The government's theory that goods or services must be "inherently expressive" provides little constraint given that Phillips's business conduct would qualify. The government's proposal that only "custom" goods might qualify for First Amendment protection is no limitation at all—particularly when it comes to small businesses. Small businesses often work directly with customers to produce those customers' desired product or service, such that any number of those products or services might reasonably be characterized as "custom" (e.g., entertainment at parties, landscaping, T-shirts, or cakes). The same is true of the government's suggestion that only when a business is

seen as offering an "endorsement," such as by providing a good or service for a specific event, would First Amendment protection attach—Amici's members provide custom goods or services for specific events all the time.

In the world of small business, where companies engage directly with customers to meet their needs, the government's purported limits lack substance, and result in no less than a rule-swallowing exception from public accommodations laws.

This Court should affirm.

ARGUMENT

A. Public accommodations laws are good for small businesses

Relying primarily on the First Amendment's protection of symbolic speech, Phillips seeks (Pet. Br. 16-32) an exemption from public accommodations laws for creating, baking, selling, and delivering a wedding cake. This Court has never applied the First Amendment to protect conduct that is not inherently expressive, and it should not do so here. And expanding inherently expressive conduct to include retail sales would effectively eliminate public accommodations laws and would would wreak havoc on the small business community, which depends on a healthy economy, robust tourism, a talented workforce, and a clear set of legal rules.

1. Small businesses form the backbone of the American economy: they make up 99% of businesses in the United States, employ 56 million of the nation's private sector workers, account for nearly half of na-

tionwide employment, and account for approximately 45% of the nation's gross domestic product. See Small Business Majority, *Small Businesses Hire Diverse Entry-Level Workforce* 3 (2015); Kathryn Kobe, Office of Advocacy, U.S. Small Bus. Admin., *Small Business GDP: Update 2002-2010* 24-25 (2012). Small businesses also drive economic recoveries, and are responsible for the majority of new jobs created. Jeff Stibel, *Why Small Businesses Aren't Hiring...And How to Change That*, Harv. Bus. Rev. (Dec. 27, 2013). In the past 20 years, small businesses created roughly two-thirds of all new jobs. *Ibid.*

Small businesses also support anti-discrimination laws. A national opinion poll conducted for the Small Business Majority found that 66% of small business owners believe they should not be able to refuse goods or services to LGBT individuals. See Small Business Majority, *Small Business Owners Oppose Denying Services to LGBT Customers Based on Religious Beliefs* 4 (2015). Eight in ten entrepreneurs support a federal law to protect LGBT individuals against discrimination in public accommodations, and nearly half (47%) strongly favor a federal law banning this type of discrimination. *Ibid.*

2. The reason for small businesses' strong preferences in favor of anti-discrimination laws is clear: small business owners recognize that exemptions from public accommodations laws hurt the entire business community. See Small Business Majority, *Colorado Small Businesses Oppose Denying Services to LGBT Customers Based on Religious Beliefs* 2-3 (2016) (polling Colorado's small business owners on a ballot initiative that would provide religious exemptions to state

and local laws, including public accommodations laws, and finding that 61% of those small business owners opposed the measure and 59% believed the measure would hurt the business climate in Colorado); see also Mich. Dep't of Civil Rights, *Report on LGBT Inclusion Under Michigan Law with Recommendations for Action* 74-75 (Jan. 28, 2013) (examining testimonials that the lack of anti-discrimination protections impacted the community's general economic health). Congress has also found that discrimination in public accommodations imposes "an artificial restriction on the market" and "interfere[s] with the flow of merchandise." *Katzenbach* v. *McClung*, 379 U.S. 294, 299-300 (1964) (citation omitted). Congress has additionally recognized that anti-discrimination laws promote healthy communities and preserve human dignity. See *Daniel* v. *Paul*, 395 U.S. 298, 307-308 (1969) (noting that "the overriding purpose" of Title II of the Civil Rights Act of 1964 was "to [re]move the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public") (citation omitted).

The deleterious economic effects of discrimination are borne out by research. For example, there is a well-documented positive correlation between countries that foster equality and the country's gross domestic product per capita. See M.V. Lee Badgett et al., The Williams Institute, UCLA School of Law, *The Relationship Between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies* 2-3 (2014) (noting the positive correlation between countries that afford rights to LGBT citizens and a country's gross domestic product per capita); cf. David

Cuberes & Marc Teignier, *Aggregate Effects of Gender Gaps in the Labor Market: A Quantitative Estimate*, 10 J. of Hum. Cap. 1, 22 (2016) (quantifying the negative effects of gender inequality in entrepreneurship and the labor market on gross domestic product); Sarah Treuhaft, Justin Scoggins & Jennifer Tran, PolicyLink, *The Equity Solution: Racial Inclusion Is Key to Growing a Strong New Economy* 2 (2014) (concluding that the American economy would gain $2.1 trillion in gross domestic product every year by closing racial gaps in income).

Similarly, states with stronger anti-discrimination laws have more small businesses and lost fewer small business during the Great Recession as compared with states with weaker anti-discrimination laws. See Kristen Jefferson & Sarah Freeman, The Bell Policy Center, *Anti-Discrimination Remedies Do Not Harm Small Business Growth* 1 (2015). And when North Carolina and Indiana recently attempted to create exemptions to anti-discrimination regimes, their economies lost millions of dollars in investment and thousands of jobs. See, *e.g.*, Christy Mallory & Brad Sears, The Williams Institute, UCLA School of Law, *Discrimination, Diversity, and Development: The Legal and Economic Implication of North Carolina's HB2* 29 (2016); Tim Evans, *Angie's List Canceling Eastside Expansion Over RFRA*, Indy Star (Mar. 28, 2015); Robert King, *Labor Union Becomes First to Pull Conference from Indy*, Indy Star (Mar. 30, 2015).

There is little doubt that local economies would suffer if this Court adopted the exemption for expressive businesses proposed by Phillips—and small businesses would be uniquely vulnerable to harmful eco-

nomic effects. Small businesses have tighter profit margins, are less geographically diversified, and have less insurance than larger enterprises. See, *e.g.*, Karen M. Gebbia-Pinetti, *Small Business Reorganization and the Sabre Professionals*, 7 Fordham J. Corp. & Fin. L. 253, 268 (2002) (describing small business vulnerability in the context of bankruptcy). As a result, they cannot hedge against risk in the same manner as larger corporations can. See Adriano A. Rampini & S. Viswanathan, *Collateral, Risk Management, and the Distribution of Debt Capacity*, 65(6) J. of Fin. 2293, 2312 (2010) (observing that small businesses are less likely to invest in risk management that diverts resources from production). Additionally, small businesses by definition have fewer resources than large businesses do. As a result, they are often unable to dip into capital reserves to adapt to changes in the marketplace, make capital investments, hire or replace employees, or make other necessary changes to adjust to a weakened local economy. See Jeff Stibel, *Why Small Businesses Aren't Hiring...And How to Change That*, Harv. Bus. Rev. (Dec. 27, 2013).

Small businesses also struggle more than large companies to differentiate themselves in the marketplace. Amici's members' experiences indicate that in communities where businesses choose to avail themselves of Phillips's proposed First Amendment exception to public accommodations laws, customers will assume that other small businesses share similar views. Most consumers and tourists do not have the time or inclination to appreciate nuanced differences between individual businesses—they will simply avoid shopping in towns and communities known to have busi-

nesses that refuse service to certain groups of people. This result is unfair to the majority of small businesses who have no interest in claiming First Amendment exemptions to public accommodations laws, but whose businesses would suffer from others assuming that they might.

In certain locations, the result of some businesses engaging in discrimination could be far worse for the small business community. Anti-discrimination laws allow businesses to coordinate on serving all protected classes in communities where ideological discrimination persists. If this Court creates a broad exemption to those laws for some could lead to pressure on other businesses to also claim exemptions, rolling back decades of progress and depriving consumers and businesses alike of a vast and diverse marketplace. See Gavin Wright, *Sharing the Prize: The Economics of the Civil Rights Revolution in the American South*, 101 (2013) (concluding that in the pre-Civil Rights Act South, "racial discrimination by one restaurant in a city encouraged the practice throughout the area because of the other proprietors' fear of the competitive advantage gained by the segregated restaurant in increased white trade," and Southern businessmen were "locked into a low-level equilibrium").

3. Discrimination also has negative effects on small businesses' hiring, retention, and employee morale. See M.V. Lee Badgett et al., The Williams Institute, UCLA School of Law, *The Business Impact of LGBT-Supportive Workplace Policies* 5-9 (2013); Sylvia Ann Hewlett, *Why LGBT Employees Need Workplace Allies*, Harv. Bus. Rev. (June 20, 2013). When business owners refuse to serve certain types of cus-

tomers, many employees do not want to work at those businesses or even live in those communities, shrinking the pool of workers available from which every business can choose. See, *e.g.*, Florida Competes, *Florida's Competitiveness for Talent Supply: Projecting the Economic Impact of Tolerance* 7 (2016) (concluding that anti-discrimination laws would help Florida attract highly productive talent). Thus, even if a business does not itself discriminate, it can lose talent to more inclusive communities. For small businesses, this means a reduction in the number of qualified employees and a loss of productivity due to unfilled positions and redundant costs of hiring and training. See Heather Boushey & Sarah Jane Glynn, Center for American Progress, *There Are Significant Business Costs to Replacing Employees* 1-2 (Nov. 16, 2012).

As with impacts to the economy in general, small businesses suffer disproportionately from fluctuations and reductions in the labor pool. With fewer employees overall, whether employees leave or a job remains vacant can make the difference for turning a profit that month, as small businesses must divert money and time from production to finding, hiring, and training new employees. See Crosby Burns, Center for American Progress, *The Costly Business of Discrimination* 7 (Mar. 22, 2012); Mich. Dep't of Civil Rights, *Report on LGBT Inclusion Under Michigan Law with Recommendations for Action* 76 (Jan. 28, 2013) (estimating that expenses associated with replacing a departing employee are between 93% and 200% of the employee's annual salary).

Amici's member businesses report that public accommodations laws—like anti-discrimination laws

generally—support employee retention.[1] For example, the owner of Foley Waite Associates fears the negative effect on employee retention that would result from the non-uniform application of public accommodations laws. Foley Waite designs and manufactures commercial and customized furniture and cabinets in Kenilworth, New Jersey. The company's work requires the effort of highly skilled designers and woodworking professionals. Foley Waite's owner describes how his employees—some of whom belong to racial or religious minorities—feel comfortable driving to and from work, working on-site with clients, and serving clients because of existing anti-discrimination laws, including public accommodations laws. As a result, Foley Waite has access to a skilled pool of employees that otherwise might not want to live or work in Kenilworth. Foley Waite's owner worries he will lose these employees if other businesses in his community are permitted to discriminate. Because employee retention is essential for business, Foley Waite opposes Phillips's proposed exemption from public accommodations laws.

4. Public accommodations laws also lower administrative burdens for small businesses when it comes to navigating personnel or other human resource issues—which is no small concern for small businesses who are often unequipped with human resource professionals, let alone lawyers, to assist them with these efforts. For example, another of Amici's member busi-

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[1] The examples in this brief from individual small businesses derive from interviews conducted by counsel with Amici's member businesses.

nesses, Raygun, located in Des Moines, Iowa, reports how public accommodations laws make it straightforward to navigate employee concerns about the scope of Raygun's work designing and creating T-shirts and other custom products. Because of public accommodations laws, the owner has a "handy" response when asked why Raygun serves all comers. Raygun has printed custom T-shirts for both a local LGBT-bar and a local evangelical church, thereby expanding its business and customer base. For this and other reasons, Raygun opposes Phillips's proposed exemptions to public accommodations laws.

Hawthorne Auto Clinic in Portland, Oregon, another member business of Amici, also benefits from public accommodations laws in the context of navigating human resources issues. Hawthorne Auto's owner explains that, because job applicants understand that the law prohibits discrimination, he does not feel compelled to inquire about whether prospective employees would be willing to serve his diverse customer base. But he fears that under Phillips's test, he would "have to be in a position to interview prospective employees based on whose cars they do and don't want to work on," a burden that would prolong and complicate his hiring process. Hawthorne Auto also opposes Phillips's proposed exemption.

In general, small businesses lack the resources to untangle the kind of complicated legal morass that Phillips's proposed exemption for expressive businesses would create. A clear set of rules allows small businesses to spend their limited resources on running their companies. Because Phillips's test places no discernable limits on what commercial conduct might be

considered "inherently expressive," it creates uncertainty for small businesses with respect to their rights and obligations in carrying out their business. Such confusion is particularly harmful to small businesses, which depend on predictable rules in the marketplace.

B. An exemption from public accommodations laws for expressive businesses is exceedingly broad and unworkable

Phillips's proposed exemption from public accommodations laws would not only be bad for business, but also impractical: far from the narrow carve-out he suggests, an exemption for expressive goods or services would embrace a wide range of business conduct and significantly undermine the protections of public accommodations laws.

The government offers (U.S. Br. 17, 21-23, 28-30) alleged limiting principles to curb the broad application of Phillips's proposed exemption, suggesting that only inherently expressive businesses that are asked to create custom products or services for "expressive events" qualify for First Amendment protection. But those principles fail to meaningfully constrain the number of businesses that could opt out of public accommodations laws under Phillips's theory. Even the government's proposed test leaves open a vast exemption available to hundreds of thousands of businesses selling all sorts of "expressive" and "custom" goods and services, for a variety of "expressive events." The government's test is just as unworkable as Phillips's proposal and fails to cure the economic hardships that would significantly impact the small business community.

1. If creating, baking, delivering, and selling a wedding cake in a commercial setting triggers an exemption from anti-discrimination laws under the First Amendment, so do countless other activities that businesses regularly provide. Styling hair, trimming shrubbery, and designing kitchen remodels are but a few examples that qualify. Many of Amici's members imbue their products and services with significant creativity and artistry, but none of them believe that entitles them to opt out of public accommodations laws when they are serving their customers.

The government purports to narrow (U.S. Br. 17) the scope of the exemption to goods or services that are "inherently communicative," assuming (U.S. Br. 21) that "[m]ost commercial transactions will fail to satisfy the threshold requirement that the product or service be inherently communicative." But the government believes that Phillips's conduct satisfies that threshold when baking and selling a wedding cake. By that logic, countless products and services that include artistic or creative elements rise to the level of being "inherently" expressive.

The government's examples to the contrary are unconvincing. The government argues (U.S. Br. 21) that a "commercial banquet hall may not refuse to rent its facilities, nor may a car service refuse to provide limousines, nor may a hotel refuse to offer rooms." But a commercial banquet hall may decorate a venue to a couple's specifications; a limousine company picking up a couple from a wedding ceremony may have internal and external décor, or other unique features, such as themed karaoke; and a hotel may tailor a honeymoon suite for a newly married couple. It takes little imagi-

nation to see that if Phillips's conduct is "inherently" communicative, those services, too, would readily qualify.

Amici's members include restaurant owners, caterers, landscapers, animators, photographers, architects, cabinet-makers, jewelers, entertainers, clothing designers, and even auto mechanics, all of whom consider aspects of their profession to be artistic, creative, or otherwise expressive. If all the government requires is an element of artistry, creativity, or expression in the offering a product or service, then there is no meaningful distinction between Phillips's business and thousands of other types of businesses. Because the government expands the scope of "inherently expressive" conduct, it provides little independent limitation.

2. The government additionally suggests (U.S. Br. 17, 22) that only businesses creating "commissioned" or "custom-made" expressive goods or services warrant First Amendment protection because only "custom" products and services implicate the compelled-speech doctrine. According to the government (U.S. Br. 3 n.1), a "custom" item is one "created for a specific event and a specific client." However, custom goods are not nearly as uncommon as the government believes, especially among small businesses.

One of Amici's member businesses, Happy Faces Entertainment in Kansas City, Missouri, creates comedy shows, magic shows, murder mysteries, and trivia games for corporate events, as well as storytelling sessions with costumed characters for children's events. Happy Faces offers both off-the-shelf performances and performances customized to customers' specifications. When designing custom shows, Happy

Faces's owner regularly communicates with his customers and incorporates their suggestions. Every custom performance he creates is unique.

Similarly, Seabold Architecture Studio in Jackson, Mississippi designs custom homes and gardens. Seabold Architecture's owner considers his craft to be "the perfect balance of art and science" as he travels "down the rabbit hole of the design process" with each of his clients. The process results in a customized design of a unique home and garden that reflects its owner's needs and goals.

Hel's Kitchen Catering in Chicago, Illinois, provides highly customizable catering services for its customers' most important "life-cycle events," such as weddings, funerals, bar and bat mitzvahs, and other "momentous times in people's lives." Hel's Kitchen customizes its menu to meet its customers' dietary restrictions by creating gluten-free, dairy-free, and vegan options. The company also customizes its dishes based on its customers' preferences and heritage, such as by creating a French and Hungarian-infused menu.

Field Outdoor Spaces in Minneapolis, Minnesota, provides custom landscaping services for urban spaces. Each project starts with a design, and is tailored to a customer's existing yard and desired features. Options include trellises, pergolas, walls, patios, walkways, paths, planting areas, rain gardens, boulder work, and stone work.

Customization is not unique to the service industry. Many small businesses create custom products for their customers. For example, Raygun creates custom T-shirts, mugs, glasses, magnets, posters, coasters, and socks for local businesses, charities, and political

candidates. Sometimes customers come to Raygun with a design in mind and Raygun modifies it to be suitable for a T-shirt or coaster. Other times, customers come in with a rough idea of the message they want to convey and Raygun generates the design from scratch. In both scenarios, Raygun mixes its creativity with its customers' vision to create unique products.

Another of Amici's member businesses, Robert Goodman Jewelers in Zionsville, Indiana, creates custom jewelry products, including unique wedding rings, which employees design to each couple's specifications. Customers may choose the type of stone, its size and shape, and the metal to be used in the band.

These are just a handful of the thousands of small businesses that regularly engage in custom work. And many of these businesses create products or provide services that are far more customized than the business conduct in the record here. Restricting First Amendment exemptions to public accommodations laws for "custom" services and products therefore imposes few limits at all.

3. The government also tries to limit the impact of Phillips's proposed exemption from public accommodations laws by suggesting (U.S. Br. 14-16, 19-21) that only expressive conduct that could be construed as "participating" in an expressive event would qualify for the exemption. The government further maintains (U.S. Br. 29-30) that a business must have a way to disclaim any "endorsement" of its customers' conduct. The government's rule yields no limitation at all, especially in the commercial context.

Conducting business by its nature creates associations with customers, but these types of everyday as-

sociations do not trigger First Amendment exemptions from anti-discrimination laws. If baking a cake for a wedding constitutes participation or endorsement of the wedding, then so is designing a ring for an engagement, arranging flowers for a funeral, or designing a T-shirt for a charity event. Religious ceremonies, graduations, birthday parties, holiday celebrations, professional and business gatherings, and sporting events could all be considered expressive events, and could all provide a predicate for exemptions to public accommodations laws under the government's test. Ultimately, there is very little that is unique to a baker providing a cake for a wedding that would not be shared with countless small businesses engaged in providing products and services for events and ceremonies, big and small, for their customers.

Not only is the government's "participation" or "endorsement" limitation unworkable, it is also bad policy. Amici's members oppose any rule of "participation" or "endorsement" by implication because such a standard creates serious challenges for small business owners. In the current business environment, public accommodations laws ensure that businesses cannot pick and choose their customers based on protected status. Because of that baseline understanding, no reasonable observer concludes that a small business participates in its customers' activities or endorses the activities of every customer it serves.

For example, a small business that provides custom place cards for a "purity ceremony" (whereby young girls take a vow of abstinence until marriage) is by no measure participating in that ceremony, sharing a vow of abstinence along with the teen girls who do,

endorsing the principle that teens should be abstinent (or not), or taking any position or delivering any message at all. The only things the business delivers are custom place cards.

Even businesses that are less obviously expressive provide custom services that could be linked to expressive events. Hawthorne Auto Clinic repairs cars. When deciding how to fix a problem in a car, Hawthorne Auto's owner relies on creativity and skill to efficiently fix components buried deep within a complex jigsaw of modern auto parts without removing unnecessary parts or creating unnecessary expense. Hawthorne Auto's owner does not ask what his customers will use their cars for when he is done repairing them, and he knows that they often drive to expressive events after they are fixed (like religious services), or use the cars in the events themselves (like honeymoons and funerals). No one associates Hawthorne Auto with any messages conveyed at these events simply because Hawthorne Auto employed customized ingenuity in fixing the car.

Similarly, the owner of Hel's Kitchen Catering provides catering services for weddings, funerals, ceremonies, and other celebrations that involve "highly emotional" atmospheres. Yet Hel's Kitchen has never construed the provision of its services as participating in its customers' events or otherwise endorsing them. Hel's Kitchen's employees become familiar with the specific customs and requirements for each event that it caters as part of providing excellent customer service—that level of service is what its customers pay for and expect. Hel's Kitchen does not have to choose

which events it will cater because it only provides a service, not an endorsement.

If the Court accepts the government's premise of participation or endorsement, the entire business landscape would change, to the detriment of small businesses that have no interest in picking and choosing their customers. Without public accommodations laws mandating equal service, small businesses would feel pressure to turn away customers out of concern that the public would associate the business with a customer. If merely selling a product or service to a customer were sufficient to associate a small business with that customer, small businesses would be forced to interrogate customers about their backgrounds or their intended use of the goods and services sought. That puts small businesses in the untenable position of losing one part of their customer base to preserve another.

For example, as noted above, Raygun has created custom T-shirts for an evangelical church while also designing custom T-shirts for an LGBT-bar located on the same street. If the public viewed Raygun as endorsing its customers' T-shirts or slogans—instead of just running a custom T-Shirt business—Raygun would be forced to choose between clients.

Public accommodations laws are good for business precisely because the community does not presume that businesses participate in their customers' activities or endorse those activities when they conduct business with them. If the Court accepts the government's premise of participation or endorsement, small businesses will suffer.

* * * * *

The application of public accommodations laws cannot hinge merely on whether a good or service has expressive elements, is "custom," or has been provided for a ceremony or other expressive event. Countless small businesses could satisfy those requirements. Any discrimination by small businesses who wish to engage in it would significantly impact the rest of the small business community. Painted with the same brush, small businesses in the same community would lose out on the tourism and economic prosperity that serving a diverse population can bring.

Small businesses simply want to continue to grow their business. This Court should avoid adopting an unprincipled, broad, and unpredictable test that will exempt innumerable businesses from public accommodations laws and negatively affect the operation and growth of small businesses.

CONCLUSION

The judgment of the Court of Appeals of Colorado should be affirmed.

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